IN THE

Supreme Court of the United States

October Term, 1966.

No. 37.

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL STATEMENT OF PETITIONER.

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INDEX.

TABLE OF CASES CITED.

STATUTES AND AUTHORITIES CITED.

STATUTES AND AUTHORITIES CITED (Continued).

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In accordance with the request of the Court, communicated by the Clerk on August 4, petitioner submits this supplemental statement addressed to the bearing on petitioner's contentions of the decision and opinion of the Court in *Rosenblatt v. Baer*, 383 U.S. 75.

I.

The Publication Was Entitled to the Privilege Established by the Rule of New York Times, as Explained and Applied in Rosenblatt v. Baer.

The judgment was reversed in *Rosenblatt* on two distinct grounds: first, that the instructions of the trial court contravened the First Amendment in permitting the jury "to find liability merely on the basis of" the plaintiff's

"relationship to the government agency, the operations of which were the subject of discussion" and "without regard to evidence that the asserted implication of the column was made specifically of and concerning him" (383 U.S. at 82); and, second, that the plaintiff as Supervisor of the Belknap County Recreation Area, a facility owned and operated by the County principally as a ski resort, "may have held" a position as a "public official" (383 U.S. at 87), within the meaning of the *New York Times* rule, and thus be barred from a recovery for defamation by a publication critical of his performance of his duties, without proof of malice as defined by *New York Times*. Though the first ground of reversal is irrelevant, the second has important bearing on this cause.

First: We recognize that *Rosenblatt* did not definitively hold that if the publication implying dishonesty in the financial management of the Ski Area could be found to make a reference to Baer the privilege of *New York Times* must necessarily apply. What the opinion states explicitly is that Baer's theory "that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations"—the theory advanced at the trial to establish that the article referred to him—"at the least, raises a substantial argument that he was a public official", within the limitation of the rule of *New York Times* (383 U.S. at 87). How substantial that argument was thought to be is indicated, in our view, by the Court's statement that one of the reasons for not foreclosing Baer from "attempting retrial of his action" was that the record, made before the *New York Times* decision, left "open the possibility that respondent *could have* (emphasis supplied) adduced proofs to bring his claim outside the *New York Times* rule" (383 U.S. at 87). The "proofs" referred to must, we think, envisage evidence showing that the scope of Baer's responsibility was less extensive than he sought to show at the first trial.

The disposition is, therefore, instinct with affirmation that if Baer was, indeed, responsible for the management of the Ski Area, the privilege would apply to a publication that impugned his efficiency or honesty in the performance of that task.

No other view appears to us to be consistent with the general criteria embodied in the Court's opinion, namely, that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" (383 U.S. at 85); and that where "a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees" (383 U.S. at 86), malice in the *New York Times* sense must be proved. It was not doubted that the operation of the publicly-owned Ski Area involved the "conduct of governmental affairs" and could not have been doubted that if Baer's position involved "substantial responsibility" for the management of the Area, the public had "an independent interest" in his "qualifications and performance . . . beyond the general public interest in the qualifications and performance of all government employees." Such reservation as there was in the Court's ruling must, therefore, be understood as a reflection of uncertainty as to whether and how far Baer was in fact involved in those aspects of the management of the Ski Area attacked by the challenged publication, not as a legal doubt that if he was responsibly involved he must prove malice to recover.

On this analysis, the *Rosenblatt* decision plainly supports petitioner's submission in this cause. Here, as in *Rosenblatt*, the official status of the plaintiff was not litigated as such at the trial. But there was no dispute, and could have been none, that as Athletic Director respondent

had, in his own words, "responsibility for . . . general supervision of the entire athletic program at the University of Georgia" (R. 654), including the "big business" (R. 655) of college football. If actual or apparent responsibility for the management of a public recreation area suffices to accord the privilege to charges of malfeasance in performance of that function, there can be no basis for a contrary result when the responsibility to which the charge relates entails the supervision of the program of athletics of a University established, maintained and supported by the State. There surely is no smaller or no less legitimate a public interest in the conduct of athletics as an aspect of a State-conducted public education program than in the use of public land and facilities for purposes of recreation. The "scope of the privilege is to be determined," as the Court said in *Rosenblatt* "by reference to the function that it serves" (383 U.S. at 85, n.). In the one case no less than in the other, the privilege is necessary to protect the freedom of the press to criticize the way in which a public trust has been discharged, a freedom that the First Amendment surely was designed to make secure.

Second: Respondent's answer to the patent parallel between this case and *Rosenblatt* is that he was not employed as Athletic Director by the Board of Regents of the University System, the governing body of the University (Ga. Const. Sec. IV, par. I; Ga. Code §§ 32-101, 32-104, 32-112, 32-113) but rather by the Athletic Association of the University, a separate corporate entity composed of a Board of faculty members and alumni (R. 262, 1161-1165), which a statute of 1949 declares "not to be" an agency of the State and the accounts of which the statute exempts from the State audit required "in connection with the financial operations of State agencies" (Ga. Code §§ 32-153, 32-154). The Athletic Association, it is urged "was thus not an arm of government" and the respondent as its employee could not "be engaged in government while per-

forming its functions" (*Further Response of Respondent*, p. 14).

We submit that the distinction is without significance for purposes of measuring the ambit of the privilege established by the principle of *New York Times*. The statutory declaration that the Athletic Associations of the State Universities are "not to be agencies of the State" can obviously have no greater import in determining how far freedom to criticize their operations or the operations of their managerial employees is protected by the First Amendment than the State definitions of the term "public official," held to be irrelevant in *Rosenblatt v. Baer*. The one denomination no less than the other was developed "for local administrative purposes, not the purposes of a national constitutional protection", with the result that it is "at best accidental" if the State-law standard should "reflect the purposes of *New York Times*" (383 U.S. at 84).

That this State terminology is wholly unrelated to the purpose of the privilege is very clear. The fact that the Athletic Association or, as it is often called, Athletic Board, is exempted from State-imposed procedures governing expenditures, contracting and accounting (*e.g.*, Ga. Code § 40-1805, 1808, 1902, 1906.1, 1921.1, 2001) does not detract from the fact that its sole function is to play a part in the management and government of the State University, subject to the ultimate responsibility and control of the President and Board of Regents (R. 262). The athletic program, of which the detailed administration was governed by the Board, was the program of the University. The position of Director of Athletics, though the incumbent was chosen and paid, at least in major part,[1] by the Association, was that of Director of Athletics of the University of Georgia.

1. The record shows that respondent received a salary of $12,000 per annum from the Association (R. 1162, 1165). The President of the University testified, however, that "part of his salary was paid by the University and therefore that part was subject to teacher retirement" (R. 1123). The additional amount involved is not established on the record. A question by his counsel sought, however, to bring out that he received $6,500 a year from the Georgia Student

The role of the Association as an organ of administration of the University has not, indeed, significantly changed since the Board of Regents and the State contended in this Court that "public education is a governmental function" and that "the holding of athletic contests is an integral part of the program of public education conducted by Georgia" (*Allen v. Regents of the University System*, 304 U.S. 439, 449 ([1938])). The President of the University is Chairman *ex officio* of the Association and Chairman of the Executive Committee (R. 262, 1070, 1092, 1104, 1161-1163). The Comptroller and Treasurer of the University is Treasurer of the Association (R. 1153). A majority of the members of the Board are members of the faculty, as required by the Southeastern Athletic Conference[2] to which Georgia belongs, and they are chosen by the President (R. 783, 161, 1162). In short, nothing distinguishes the Athletic Association from any other entity responsible for the administration of the programs of the University except that it has a larger measure of financial autonomy and that there is minority participation of alumni. To accord these differentia constitutional signifi-

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Educational Fund (R. 1165). The State Department of Audits Report of Examination of the University of Georgia for the year ended June 30, 1963, a document that Georgia law requires to be filed for public information (Ga. Code § 40-1805(c)), shows (p. 211) payments by the University to respondent as Athletic Director of $1,666.64 for the eight months before his resignation.

2. This requirement tends to comply with the first recommendation of the Report of the Special Committee on Athletic Policy of the American Council on Education, approved by the Executive Committee of the Council in 1952, that as "in all other educational activities, the control of athletics should be held absolutely and completely by those responsible for the administration and operation of the institution." See *Council Action on Athletic Policy*, The Educational Record, vol. xxxiii, pp. 246, 249 (1952). A study by the Carnegie Foundation, published in 1929, listed Georgia as an institution in which "genuine faculty control" of the regulation of college athletics had been found. Savage, *American College Athletics*, p. 101 (Carnegie Bulletin No. 23).

cance would trivialize the principle of *New York Times.* The considerations that preclude a State from avoiding the limitations of the Fourteenth Amendment by the delegation of its public functions are even more plainly applicable here. *Cf. Burnet v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *Evans v. Newton,* 382 U.S. 296 (1966).

Third: In his original response to the petition, respondent sought to draw strength from this Court's decision in the *Allen* case that State immunity to Federal taxation did not extend to gate receipts for public admission to athletic contests of the University, since the exhibition of such contests is "a business having the incidents of similar enterprises usually prosecuted for private gain" (304 U.S. at 452). *Response to Petition,* p. 24. The District Court accorded weight to this submission in denying the petitioner's motion for new trial (R. 1467; *Petition,* Appendix B, p. 95a).

It is enough to point to *Rosenblatt* to answer this contention. The conduct of a public recreation area, charging admission fees, also involves a "business comparable in all essentials to those usually conducted by private owners" (304 U.S. 439, 451), yet no importance was attributed to that fact in considering if *New York Times* applied. The reason is entirely obvious. The fact that government undertakes enterprise similar to that in which non-governmental entities engage does not diminish, and at times may well increase, the need for freedom of discussion of the way in which the public enterprise is run and of the honesty or the efficiency of those who have it in their charge. The policies that govern the extent of governmental tax immunity have no relationship at all to those that measure the extent of the protection conferred by the First Amendment.

Fourth: There is no greater merit in other distinctions the respondent seeks to draw between this case and *Rosenblatt.*

The suggestion (*Further Response,* p. 5) that there was no issue as to Butts' performance of his duties as Athletic Director prior to the instant publication is not true[3] and, even if it were, would be irrelevant. What is decisive is the scope of his responsibility for supervising the entire athletic program of the University. If that position was "one which would invite public scrutiny and discussion of the person holding it" (383 U.S. at 87, n.), as we submit it plainly was, the privilege must necessarily apply to the first published criticism of his official conduct, no less than to the later publication of a criticism previously made.

Nor is there force in the submission that the criticism here involved "did not relate to his conduct of his duties as Athletic Director" (*Further Response,* pp. 6-7) because the Football Coach, not the Director, was responsible for formulating the team's plan and strategy. It was because he was Director that respondent had access to the team's secret practice sessions (R. 405). It was as Director that he was responsible for scheduling the game with Alabama (R. 580) and, perforce, for safeguarding its full integrity as a scholastic competition. It might as well have been contended in *Garrison v. Louisiana,* 379 U. S. 64 (1964) that the defendant's insinuation that the judges were subject to "racketeer influences" (379 U.S. at 66) did not relate to their official conduct since they were not authorized by their commissions to pervert the course of justice.

Fifth: Our contention that respondent as Director of Athletics was a public official for the purpose of the rule of *New York Times* does not necessarily imply that every member of the faculty or of a State University is in the

3. Burnett reported his story to the University authorities before he disclosed it to petitioner and his charges were being investigated by a member of the Georgia Athletic Board, the President of the University, the Chancellor of the University System, the Chairman of the Board of Regents of the University system, the Commissioner of the Southeastern Athletic Conference and the President of the University of Alabama. R. 194, 259, 266-267, 1125, 1215-1216. See Appendix, *infra* pp. 28, 29, 31.

same position. For one thing, a member of the faculty is not as such charged with a supervisory or managerial responsibility to which the principle declared in *Rosenblatt* would easily apply. But more than this, freedom of teaching, research and scholarship is itself protected by the First Amendment. *Cf. Sweezy v. New Hampshire,* 354 U.S. 234, 250-251, 261-263 (1957). To the extent that liability for defamation unqualified by a privilege safeguards academic freedom in conducting such activity, it may be argued that it also serves "the values nurtured by the First and the Fourteenth Amendments" and may thus avoid the "thrust of *New York Times*" (383 U.S. at 86). That proposition must be weighed against the argument *per contra* that the accommodation that resolves the "tension" (383 U.S. at 86) between First Amendment values and the social interest in protecting reputation is no less appropriate in dealing, in addition, with conflicting interest in the freedom of expression. Weighing that dilemma it may still be the conclusion that the privilege applies to any statement challenged as a defamation if it relates to a subject on which freedom of expression is protected by the First Amendment. *Cf. Smith v. California,* 361 U.S. 147 (1959); *Speiser v. Randall,* 357 U.S. 513 (1958); *Coleman v. MacLennan,* 78 Kan. 711, 723 (1908); *Rosenblatt v. Baer,* 383 U.S. at 89 (concurring opinion).

For reasons previously stated, a less subtle problem is presented by this case. The respondent was responsible for supervision of the University's athletic program. Neither that program nor its supervision involves modes of self-expression comprehended in the freedom that the First Amendment guarantees. But since the management of a State University is plainly a governmental enterprise, criticism of the operation of the program of the quality or the integrity of its direction "is at the very center of the constitutionally protected area of free discussion" (383 U.S. at 85). The social "interest in preventing and redressing attacks upon reputation" must, accordingly, yield

place to the "values nurtured by the First and Fourteenth Amendments" (383 U.S. at 86) to the extent required by the privilege of *New York Times*.

Sixth: It should be added that the public interest in the quality and the integrity of the respondent's conduct as Director of Athletics does not derive only from the fact that Georgia is a State University, decisive as that fact is to invoke the privilege of *New York Times*. The integrity of college football, whoever the participants, is in itself a matter of important and legitimate concern, as an activity on public exhibition and a phase of higher education. This public interest in the subject matter of the publication would, we think, suffice to gain it the protection of the First Amendment, even if it were not otherwise within the rule of *New York Times*.

"Criticism of government is at the very center of the constitutionally protected area of free discussion" (383 U.S. at 85) but it is plain that this is not the only subject on which freedom of expression is protected by the First Amendment. We think the safeguard comprehends discussion of all public issues, in the sense of any subject as to which the public has important and legitimate concern. See, *e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 221; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 Cornell L.Q. 581, 591-595 (1964); Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657, 661 (1966); *Coleman v. MacLennan*, 78 Kan. 711, 723 (1908). It was, indeed, said by the Court in New York Times, and repeated in the subsequent decisions, that our "profound national commitment" is to "the principle that debate on *public issues* (italics supplied) should be uninhibited, robust and wide-open . . ." (376 U.S. at 270).

That this publication was addressed to such a public issue, we submit is wholly clear. James Bryant Conant is not alone in the belief that the "strength of this republic is . . . intimately connected with the success or failure

of our system of public education" (*Education in a Divided World* (1948) p. 1). As President Kennedy stated in his Special Message to the Congress proposing the measure that became the Higher Education Facilities Act of 1963 (77 Stat. 363), "from every point of view, education is of paramount concern to the national interest as well as to each individual" (*Public Papers of the Presidents of the United States,* 1963, p. 106). Because of the magnitude of that concern, Congress, as President Kennedy put it in an earlier message (*id.,* 1962, p. 111), "has repeatedly recognized its responsibility to strengthen our educational system without weakening local responsibility," citing enactments reaching back to the Northwest Ordinance of 1787 and the Morrill Act of 1862.

To affirm public concern in education is, of course, to affirm such concern in all the problems it confronts, which never were of greater moment than they are in our time. The maintenance of the integrity of the athletic programs of the colleges and universities that engage in intercollegiate competition does not pose the largest issue in the field of higher education but it has presented an important problem through the years. Its importance is attested by the Report of the Special Committee on Athletic Policy of the American Council on Education, composed of eleven Presidents or Chancellors under the chairmanship of John A. Hannah of Michigan State, which was unanimously approved by the Executive Committee of the Council in 1952. The Report (*Council Action on Athletic Policy,* The Educational Record, vol. xxxiii, pp. 246-255) states, *inter alia*:

> American colleges and universities engage in intercollegiate athletics because of a deep conviction that when properly administered they make an important contribution to the total educational services of the institution. There is an increasingly widespread awareness, however, that athletics may become so severely infected with proselyting, subterfuge, and distorted purpose as to more than neutralize the benefits. Certainly the abuses and suspicion of abuse now

associated with the conduct of intercollegiate athletics foster moral apathy and cynicism in our students—those young men and women who increasingly share responsibility for this country's strength and freedom.

The urgency of the problem is even more apparent in the context of current external and internal threats to our society. In the last analysis, the strength of our free society depends not only upon armaments but also upon the integrity of our institutions and our people.

This committee, after consulting competent authorities, has reluctantly reached the conclusion that in intercollegiate athletics as now conducted, despite the adherence by many institutions to the highest standards, serious violations not only of sound educational policies but also of good moral conduct are not in fact uncommon. Wherever these exist, they can only be injurious to athletics, to our schools and colleges, and especially to our youth.

The present situation has been brought about by external pressures and internal weaknesses evident during a considerable period. The rewards in money and publicity held out to winning teams, particularly in football and basketball, and the desire of alumni, civic bodies, and other groups to see the institutions in which they are interested reap such rewards, have had a powerful influence on many colleges and universities. The influence has been magnified when control of athletic policy has been permitted to slip from the hands of the faculty and central administration.[4]

4. *Cf.* Savage, *op. cit. supra* note 2, p. 32: "Whatever the reason, it is certain that the seriousness with which college athletics are nowadays taken has driven certain well-recognized abuses under cover, but at the same time has propagated and intensified them." See also, *e.g.*, Miller, *The Truth About Big Time Football* (1953) *passim*; Guthrie, *No More Football for Us!*, Sat. Ev. Post, Oct. 13, 1951, p. 24.

We submit that an honest statement charging conduct constituting one of these abuses is protected by the First Amendment; and that the privilege this Court has deemed essential to safeguard the honest criticism of all governmental operations (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280) is no less required to protect a publication of this kind. In a society in which the relationship between government and private enterprise assumes as many diverse forms as in our own, including the extent of public subsidy, it would be a grave misfortune if the freedom that the Constitution deems most vital for correction of abuses were confined by any artificial lines. *Cf. Associated Press v. Walker*, No. 150, October Term, 1966 (petition for certiorari filed May 18, 1966); *Time Inc. v. Hill*, No. 22, October Term, 1966, reargument ordered June 20, 1966, 384 U.S. 995.

II.

Respondent's Argument That "Actual Malice Within New York Times Was Conclusively Proven" Is Both Legally Immaterial and Wholly Unsupported by the Record.

In the effort to avoid review and reversal of this enormous judgment, respondent argues that malice in the sense of *New York Times* was "conclusively proven". *Further Response*, p. 7; *Response*, p. 26. The argument is legally immaterial and wholly unsupported by the record.

First: The argument is legally immaterial because, respondent notwithstanding (*Response*, p. 33; *Further Response*, p. 9), the instructions to the jury did not call on it to make a finding that comports with the requirements of *New York Times*.

As we pointed out in our petition, the District Court charged (R. 1356) that "actual malice encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others." It is too plain for argument that this statement does not

condition the punitive award on finding that a false statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 280) or make clear that "only those false statements made with the high degree of awareness demanded by *New York Times*" may be the basis of recovery. The charge, precisely like those held erroneous in *Times, Garrison, Henry v. Collins*, 380 U.S. 356 (1965) and *Rosenblatt* (383 U.S. at 83-84), allowed "recovery on a showing of intent to inflict harm rather than intent to inflict harm through falsehood"[5] (380 U.S. at 357) or even short of this, a merely "negligent misstatement" (383 U.S. at 84). The grounds for reversal in the previous decisions are, accordingly, presented here.

By the same token, it is wholly immaterial that the District Court gave as ground for the denial of the motion for new trial that "there was ample evidence from which a jury could have concluded that there was a reckless disregard of whether the article was false or not" (R. 1467-1468, *Petition*, Appendix B, p. 96a), or that the majority of the Court of Appeals was "in complete accord" with that conclusion (*Petition*, Appendix B, p. 33a). The simple and decisive fact is that the question was, at most, for the decision of the jury under an appropriate instruction. It was not decided by the jury since no issue was submitted in these terms.

Second: There is no support for the contention that knowledge of falsity or reckless disregard was "conclusively proven" at the trial.

We note *in limine* that this is an entirely paradoxical submission since, as we observed in our petition, the trial court's ruling that there was a jury question on defendant's plea of truth despite the burden of persuasion placed on the defendant (R. 480-488) and its statement in the charge

5. That petitioner was well aware that the publication threatened harm to the respondent was, of course, readily admitted (R. 945, 1014).

that there "has been a sharp conflict in the testimony in this case" (R. 1360) applies *a fortiori* if the plaintiff must establish falsity and reckless disregard. Indeed, the syllogism is not only valid with respect to the issue of truth, as to which *Times* would shift the burden to the plaintiff. It is also valid on this record with respect to reckless disregard, since the defendant's evidence of truth was, apart from small detail, the very evidence that led the publisher to think the story true when it was published. How the same evidence that would have justified a jury verdict that the statement was essentially the truth could fail to justify the publisher's conviction of its truth, the respondent as yet has not explained.

It is, in short, entirely plain that on the record as evaluated by the courts below a jury correctly instructed as to the burden of proving falsity and the required proof of malice could have reasonably found for the defendant. Indeed, the record in this case, which we have summarized in the *Appendix*, yields a graphic demonstration of the difference in defending libel actions between the criterion of liability enunciated at the trial and that prescribed by *New York Times*.

For the reasons stated we believe reversal is required whether or not the evidence would have sustained a jury finding that the publication was malicious; and that the Court is not, therefore, obliged to make its own appraisal of the record. But were the evidence to be considered, we should strongly urge that far from the conclusive proof to which respondent has referred, it lack entirely "the convincing clarity which the constitutional standard demands" (*New York Times Co. v. Sullivan*, 376 U.S. at 285-286).

As we show in detail in the *Appendix* (pp. 28-29, 40-44), petitioner in publishing the article relied essentially on Burnett's sworn statement as to what he had overheard and a number of circumstances tending to corroborate his story. Those circumstances were ascertained in the course of the Post's investigation prior to the publication, an investigation conducted by Frank Graham, an experienced sports

writer who subsequently wrote the article, and Furman Bisher, sports editor of the Atlanta Journal, who had independently called the attention of the Post to Burnett's charges.

Among the corroborating circumstances were the facts that Burnett before talking to the Post, and at a time when he had no motive to falsify, had reluctantly reported his charges to Coach Griffith and consented to Griffith's laying them before the University authorities, who had promptly initiated an investigation; that Milton Flack, whom Burnett claimed to have told about the conversation on the day that it occurred, confirmed that he had done so; that Burnett had voluntarily submitted to a lie detector test requested by the University authorities and passed; that the records of the Southern Bell Telephone Company confirmed the fact that a call had been made by Butts to Bryant on September 13, 1962;[6] that Burnett claimed to have taken notes while he listened to the conversation; that the notes had been seen by Flack and Griffith; that the notes, together with Burnett's charges, were believed by Coach Griffith to be sufficiently important to report them to the University authorities; that on the occasion when Burnett saw Griffith, Griffith indicated that he had a suspicion that someone had been giving information to Alabama; that when Butts was called before the University authorities he refused to take a lie detector test and the next day submitted his resignation as Director of Athletics (R. 915); that the Georgia-Alabama game was a fiasco for Georgia; that Furman Bisher, purporting to have talked to people at the University, called Graham on March 1 and reported statements that he claimed were made by Georgia player Babb, Georgia

6. At the trial it was established that the September 13 call lasted 15 minutes and 2 seconds and was charged to the credit card of the Georgia Athletic Association (R. 165-167). It was also proved that Bryant had called Butts at his home the following Sunday, as Burnett claimed he said he would, the call lasting 67 minutes and charged to the credit card of Bryant (R. 169, 300, 1417).

trainer Richwine, and Coach Griffith, all of which tended to support the proposition that the Alabama team was familiar with Georgia's plays and formations; that two weeks before the Post issue went on sale, the completed story was sent to Bisher by Graham and Bisher made no comments or suggestions.

On the basis of this information Clay Blair, Jr., the Post's then editor-in-chief, and Davis Thomas, its managing editor, whose testimony the respondent took by deposition, swore that they were satisfied of the truth of the assertions in the publication.

Against the foregoing circumstances of corroboration, the respondent points to the fact that no representative of the Post saw Burnett's notes before the article was published, efforts to obtain them from the University authorities proving unavailing; that the Post knew that at a meeting with the University authorities on February 21, 1963, Burnett was confronted with the fact that he had been convicted and placed on probation on a charge of cashing two checks totalling $45 against insufficient funds (a dereliction the respondent's counsel charitably asserts establishes that he was known "as a bad-check artist" [*Response*, p. 27]); that the Post did not interview John Carmichael, Burnett's office associate, to whom Burnett claimed he had reported the Butts-Bryant conversation immediately after overhearing it on September 13 (a report very substantially confirmed by Carmichael in his testimony at the trial), because it was known that Carmichael had opposed Burnett's disclosure and would not be cooperative; that the Post did not review the film of the Alabama-Georgia game, though its sports editor wished to do so; that neither Butts nor Bryant was interviewed in the Post's investigation; that some of the quotations of statements of Georgia players and football staff, given Graham by Furman Bisher, were used without interviewing the quoted parties, who denied at the trial that they had made them; that the Post

did not interview any coach or member of the Alabama team; that seven days before the publication date of the story, the respondent's counsel sent a telegram and letter to the Post stating without specification that the proposed content of the article was false; that during the week before the publication the respondent's daughter telephoned Clay Blair and tearfully requested him to forego publication; and, finally, that a demand for a retraction was presented and ignored.

We submit that this evidence affords no basis for concluding that petitioner's agents published the Graham article knowing that its essential statements were false or with a "high degree of awareness of their probable falsity". The important statements were derived in every instance from informants on whose truthfulness and accuracy the Post editors had reason to and did rely.

As another panel of the court below has recently observed in reversing a libel judgment, a "reporter . . . may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official" (*New York Times Co. v. Connor,* No. 22362, decided August 4, 1966, Slip Opinion, p. 22). It may be argued that the petitioner's investigation was in some respects inadequate. But even if the argument should be sustained, we think it clear that the inadequacy claimed shows negligence and nothing more.

Respondent's statement that "Curtis was informed of the falsity of the story" by his counsel's telegram and letter and his daughter's phone call (*Response,* p. 26), is, of course entirely disingenuous. If a denial unaccompanied by information or a mere appeal for sympathy suffices to defeat the privilege of *New York Times,* the great principle of that decision would be nullified at once in application. The opinion happily makes clear that it was not envisaged that such nullification should prevail (376 U.S. at 286-288).

It remains to add that the respondent drew great strength before the jury, and seeks to draw strength here, from statements by Clay Blair, Jr., the Post's editor-in-chief that he wished to change the image of the Post (R. 940) to "restore the crusading spirit, the sophisticated muckraking, the expose in mass magazines" (R. 943) and that in November, 1962 he had circulated a congratulatory staff memorandum stating that "the final yardstick" of this policy was that "we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism" (P. 6, R. 1376, 946-947). He also described the issue containing the publication here involved, as "a step in the right direction", adding that with this issue "we have gone twenty-five per cent toward the goal of the magazine I envision" (R. 940).

This is admittedly language that invites inflammatory misconstruction. Read in connection with the evidence we have detailed, we do not think that it permits a finding that petitioner embarked on a policy of grave indifference to the truth and that the instant publication was a product of such reckless disregard. The "high degree of awareness" of the "probable falsity" of challenged statements, demanded by the rule of *New York Times* calls, in our submission, for a judgment based upon the sources of the publication and their actual impact on the minds of those responsible for the derogatory statements made. Judged in these terms, we think the evidence makes clear this was a wholly honest publication, reflecting the conviction of the agents of the Post that Burnett was a credible informant, whose story was sufficiently confirmed to be believed.

CONCLUSION.

For the foregoing reasons, as well as on the other grounds set forth in the petition for a writ of certiorari (pp. 17-21), the petition should be granted and the judgment be reversed. A summary reversal on the authority of *Rosenblatt v. Baer* would be a proper disposition.

Respectfully submitted,

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Appendix.

SUMMARY OF EVIDENCE.

1. The Butts-Bryant Telephone Conversation.

George Burnett, an Atlanta insurance man, testified that on Thursday, September 13, 1962, he was in the office of the Institute of Oral Hygiene on 11th Street in Atlanta, Georgia, attempting to call a business associate at the office of Communications International in the Rhodes-Haverty Building (R. 178), Jackson 5-3536 (R. 190-91). After four or five attempts, he heard "funny noises and electronic sounds" (R. 178), and then heard the operator say to a party whom she identified as Coach Butts:

> "Coach Bryant is out on the field but is on his way to the phone. Do you want to hold or do you want him to return the call?"
>
> "I will hold." Coach Butts replied (R. 178-179).

After a brief pause, a man, whom the operator identified as Coach Bryant, was heard on the line (R. 179). After the usual amenities (R. 179), Coach Bryant asked:

> "Do you have anything for me, Wally?" (R. 206).

Respondent then began to give Bryant information about the offensive and defensive plays to be used by the University of Georgia in its opening game with the University of Alabama on September 22 (R. 179, 205-206).

As the conversation progressed, Burnett began to make notes (R. 180, Def. Ex. 12, R. 1413), writing as he could get the words (R. 181), abbreviating as best he could (R. 185-86, 210), missing some portions of the conversation (R. 226-27).

According to Burnett, respondent told Bryant that Georgia lineman Reismueller was one of the best in the history of the school (R. 181), that Georgia's leading pass

receiver, end Mickey Babb (Griffith—R. 316; Pearce—R. 434), "catches everything they throw" (R. 188), and that halfback Don Porterfield was the best back at Georgia since Trippi (R. 186). Respondent said that Georgia safety-man Woodward committed himself fast on pass defense (R. 183), and that Georgia's pass defense was so weak that Alabama could pass in anybody's direction except Blackburn's (R. 184), Georgia's best defensive back (Griffith—R. 312).

One play was identified by a name (29-O Series) (R. 188), which was not recognized by the Georgia coaching staff (Griffith—R. 316, 359; Pearce—R. 474), but which was readily identified by Bill Hartman, respondent's former backfield coach (Hartman—R. 984, 989, 997-98), as an abbreviation of "29 overpass," the name of a play used by respondent during his tenure as head coach (Hartman—R. 997-98). Burnett quoted respondent as having said:

> "You remember my old 29-O series?" Butts asked. "Georgia uses that" (R. 188).

Burnett testified that respondent said that the formation Georgia played until they got close to the goal line was a slot to the right with the ends normal—split out about three yards (R. 186). Burnett did not remember what respondent said about "slot right, left end out 15 yards," other than what he wrote down (R. 189). These were the two basic offensive formations which were to be used by Georgia in the Alabama game (Griffith—R. 306-307, 317; Inman—R. 393; Pearce—R. 432-434). According to Burnett, Bryant was also told that when Georgia would get near the goal line "Baer (end Mickey Babb) goes on a hook" (R. 186).

Burnett further reported that respondent told Bryant that on "optional left pass," if Georgia can block the man on the corner, they keep running—if not, they will pass (R. 181). Although the optional left pass terminology has been originated by respondent during his tenure as head

coach (Griffith—R. 309-310; Butts—R. 662), Georgia had used that terminology only once since Johnny Griffith became head coach in 1961 (Griffith—R. 328), and it was not used in 1962 (Griffith—R. 309-10, 328; Pearce—R. 466).

On defense, Georgia would drop the end off and contain with its tackle, respondent said (Burnett—R. 189), and on sweeps (end runs) Georgia would pull its on side guard (R. 183). Assistant coach Pearce confirmed that on sweeps Georgia pulled its on side guard against certain defenses (R. 426, 428).

Burnett reported that at intervals during the conversation, Bryant asked respondent questions about the Georgia team (R. 190). One particular question which Burnett remembered was:

> "How about quick kicks?"
> "Don't be worried about—", Coach Butts said "Don't be worried about quick kicks, they haven't got anybody that can." (Burnett—R. 187-188).

In fact, the Georgia team did not have anyone who could quick kick from its normal offensive formation (Griffith—R. 314-15; Pearce—R. 434), although a substitute quarterback could quick kick from a special formation (Hartman—R. 982).

During the conversation, according to Burnett, respondent was unable to answer some of Bryant's questions, but replied:

> "I don't know."
> "Can you find out?" Bryant asked.
> "I will try." Butts replied (R. 204).

As the conversation ended, Bryant asked Butts:

> "Will you be home Sunday, Wally?"
> Butts replied, "Yes, I will."
> Bryant said, "I'll give you a call then."
> "All right." (Burnett—R. 189, 203).

Burnett testified that after the call ended, he remained on the line and spoke to the operator (R. 189). However, the court ruled that what Burnett said to the operator, as well as what the operator replied, would be hearsay, and sustained an objection to it (R. 189-90).

Burnett, a former navigator, made a notation of the time and date as a matter of habit—"641[1] Athletic Office, 10:40 A.M., September 13, 1962, Jackson 5-3536." (Burnett —R. 189-90, Def. Ex. 12, R. 1415). According to Burnett, he sat there for twenty or thirty seconds and then dialed the number which he had originally called, Jackson 5-3536, and spoke to Milton Flack at the office of Communications International (R. 191). Again, Burnett was prevented from testifying as to what he said to Flack on the ground it was hearsay (R. 191).

Records of the Southern Bell Telephone Company confirmed that the call had been made (Flemming—R. 165-67). The toll card (Def. Ex. 13, R. 1416) showed that a long distance call had been placed by Wallace Butts to Paul "Brince" at the Athletic Department of the University of Alabama in Tuscaloosa at 10:29 A. M. on the morning of September 13. The call lasted 15 minutes 2 seconds and was charged to the credit card of the University of Georgia Athletic Association (Flemming—R. 165-67).

Burnett stated that later on the same day he discussed what he had overheard with his two business associates, Milton Flack and John Carmichael and showed them his notes (R. 201).

Carmichael testified for respondent and denied parts of Burnett's story (R. 810-868). He stated he came into the office of the Institute of Oral Hygiene, which was his company, about 10:30 on the morning of September 13, 1962 (R. 812). He found Burnett at Carmichael's desk with the telephone to his ear (R. 813). When Burnett

1. This number was identified as one of Coach Bryant's extensions at the University of Alabama Athletic Department (Bryant—R. 563).

put his finger to his mouth, Carmichael walked outside the door to where there was a secretary's desk and began looking through the morning mail (R. 813). He was six to eight feet from where Burnett was seated (R. 814). After five or six minutes, during which there was no conversation by Burnett over the phone, Burnett called him into the office and said "John—I heard a conversation between Coach Wally Butts and Coach 'Bear' Bryant—and I made some notes about it." (R. 814-815). He stated that if Burnett had said anything into the phone receiver, he would have heard it (R. 815). He specifically denied that Burnett spoke to the operator, or Milton Flack or anyone else (R. 816).

Carmichael testified further that Burnett related that in the telephone conversation respondent had said that some football player was a great football player and that Georgia had two new coaches; and that Bryant had asked respondent if he was going to be home Sunday (R. 817-818). Outside of that, said Carmichael, there was nothing particularly involved in the Butts-Bryant conversation as reported by Burnett except general conversation (R. 818). Carmichael testified further that Burnett related the same thing to Milton Flack and himself that afternoon (R. 819-820); that Flack told Burnett he didn't think there was anything to it (R. 820); and that they both told Burnett to forget it (R. 820).

Carmichael also testified that the notes produced at the trial were not the notes shown him by Burnett on September 13 (R. 851, 1068).

On Sunday, September 16, 1962, Coach Bryant called respondent at his home in Athens. Although both respondent and Bryant testified that they were unable to remember the call (Bryant—R. 529; Butts—R. 776), long distance telephone records (R. 1417) showed that a call was placed from the University of Alabama at 8:51 p.m. and lasted for sixty-seven minutes (Flemming—R. 169). It was billed to the credit card of Paul W. Bryant (Flemming—R. 169; Gorday—R. 300).

Respondent testified he had known Bryant since Bryant was a player at Alabama (R. 643) and that he had talked to Bryant on numerous occasions (R. 645, 647). Specifically, he called Bryant in the summer of 1962 to inform him that respondent had learned that the enforcement of certain rules would be improved (R. 645). He had never turned down anyone who asked him a "coaching point" (R. 643-644). He talked to Bryant at least three times prior to and throughout the 1962 football season (R. 647). On many occasions he talked with other coaches (R. 652-654).

Respondent could not identify the telephone calls of September 13 and 16, 1962 (R. 648, 776). He emphatically denied that in the call of September 13 or at any other time, he gave Bryant information relating to secret plays, formations and defenses which the University of Georgia had in its game plan for the Alabama game (R. 647-648, 652). He stated he had never known the game plan of Coach Griffith for any game (R. 651).

The first time he learned of the September 13 call was when John Carmichael called him from Alabama when he was attending a funeral in Philadelphia, on January 30, 1963, (R. 648-650) to warn him that Burnett had told his story (Carmichael—R. 844-845). He had known Carmichael for a number of years (R. 650).

Respondent denied that he discussed with Bryant the subjects reflected in the notes produced by Burnett (R. 658-681). He said he did not know what plays or formations Georgia planned to use in the Alabama game (R. 681, 682).

Bryant had no recollection of whether respondent called him on September 13, nor, if the call was made, of what was said (R. 529). He flatly denied that respondent at any time gave him information relating to the plays, formations, or defenses to be used by Georgia against Alabama (R. 529-532). He also indicated that if respondent had given him such information, he would not have believed it (R. 532). Bryant further testified that Alabama was not properly prepared for one formation Georgia used

in the game (R. 542-545), and made no significant changes in Alabama's defensive plan between September 13 and the day of the game, September 22 (R. 547). He attacked Burnett's statement that the operator on the September 13 call said, "Coach Bryant is out on the field, but he'll come to the phone. Do you want to hold, Coach Butts, or shall we call you back?" by stating that the practice field at Alabama is three blocks from the office having extension 641, and morning practices had been discontinued by September 13 (R. 563-564). He pointed out that according to phone company records he had not only talked to respondent for 67 minutes on September 16, but also to the University of Texas coach for 37 minutes (R. 568). He stated that during September, 1962 he discussed a number of matters with respondent, such as schedules, whether to play the game in Tuscaloosa or in Birmingham, for Georgia to buy and install lights, tickets, the bank situation, what time the Georgia team wanted to work out, the investment they were both interested in, enforcement policies of certain rules, football in general, and respondent's passing game (R. 569-571).

Burnett testified he did nothing about the call which he had overheard until January 4, 1963 when, unable to restrain himself any longer, he told his close friend, Bob Edwards, about it (Burnett—R. 192; Graham—R. 899). Burnett was prevented from testifying as to what he told Edwards, on the ground it was hearsay (Court—R. 192). Edwards communicated the information to Griffith, and in January, 1963, Burnett and Edwards met Griffith at his room at the Atlanta Biltmore Hotel, where Griffith was attending a meeting of the Southeastern Conference. (Burnett R. 193, 211, 252; Griffith—R. 304).

Griffith testified that during the 1962 season he had suspected that someone had been giving Georgia's plays and formations to her opponents (R. 376), and that he said to Burnett "I figured somebody had been giving information to Alabama." (R. 369).

Griffith called J. D. Bolton, Comptroller of the University of Georgia, and Treasurer of its Athletic Board, who was also at the meeting at the Biltmore, (Bolton—R. 262). Bolton went to Griffith's room and was shown Burnett's notes (Bolton—R. 263). Upon his return to Athens on Saturday, January 26, 1963, Griffith turned the notes over to University President O. C. Aderhold (Bolton—R. 263; Griffith—R. 304). That night the notes were delivered to Cook Barwick, a member of the Georgia Athletic Board at his home in Atlanta (Bolton—R. 263-64).

During the following week, Burnett and Edwards met with Dr. Aderhold, J. D. Bolton, and Barwick (Burnett—R. 19[illegible] 259). Burnett consented to a recording of the meeting (Burnett—R. 259). Ten days later, Burnett again met with the University officials at Barwick's office, where he signed an affidavit (Burnett—R. 195) and agreed to take a lie-detector test administered by an expert selected by the University (Burnett—R. 195). In compliance with this request, during the first week of February, Burnett took such a polygraph test (Burnett—R. 196). On February 21, 1963, Burnett was asked to meet with officials of the University and with Bernie Moore, Commissioner of the Southeastern Conference. At this meeting, Burnett was confronted with the fact that he had been arrested and was on probation on a bad check charge involving two checks totalling $45 (Graham—R. 909-911, 914). Frightened and angry (Graham—R. 913), Burnett sought the advice of his attorney, Pierre Howard (R. 224), and for the first time told Howard of the call which he had overheard (Burnett—R. 231, 234). Howard told Burnett that representatives of the Post were in Atlanta and recommended that he tell them his story before he was maligned (Burnett—R. 232, 233). Howard called Graham and arranged an appointment (Burnett—R. 233-234). Burnett agreed to give his story to the Post and a contract was arranged by Howard (R. 501) under which Burnett was to receive $2,000 for telling his story and $3,000 additional if the

Post story turned out to be an exclusive (R. 1387). Pierre Howard (Pl. Ex. 11, R. 1880) and Milton Flack (Pl. Ex. 8, R. 1377) were each paid $500 by the Post (Graham—R. 502).

Respondent was asked to attend a meeting at Cook Barwick's office in Atlanta on Friday, February 22 (Butts—R. 684-86). Upon his arrival, he found not only Dr. Aderhold, J. D. Bolton and Barwick, but also Harmon Caldwell, Chancellor of the University System; James Dunlap, Chairman of the Board of Regents; Bernie Moore, Commissioner of the Southeastern Conference, and a close friend and former coaching assistant, Bill Hartman (Bolton—R. 266-67). After brief prefatory remarks by Dr. Aderhold (Aderhold—R. 1100-1102), Cook Barwick explained the nature of the charges made by Burnett and the results of the investigation (Aderhold—R. 1101). Respondent was handed a copy of the Burnett notes (Bolton—R. 267, 1154; Butts—R. 684; Aderhold—R. 1101). After reading them briefly, respondent said, according to Bolton:

> "No doubt the guy heard what he said he heard. I don't blame him for placing the interpretation that he did on this conversation. If I had been in his place, I probably would have thought the same thing, but he is mistaken. It's just conversation, ordinary football talk among coaches, and that you know I would never give old Bryant anything to help him and hurt Georgia. . . . If I did give any information to hurt Georgia it was not intentional." (R. 267, 277).

Dr. Aderhold testified that respondent "indicated that the call was made, and that these items were probably discussed, but they did not mean what Mr. Burnett had indicated that they did mean." (Aderhold—R. 1101-1102). Respondent testified that, on being shown the notes, "I said such a telephone call might have been overheard. I did not evaluate the notes." (Butts—R. 684). Hartman testified that respondent stated: "it was possible that a

telephone conversation could have been overheard . . . but that it had been misconstrued." (Hartman—R. 977).

According to Dr. Aderhold and Bolton, respondent was asked to take a lie-detector test and sign an affidavit as Burnett had done (Bolton—R. 273; Aderhold—R. 1103). Respondent and Hartman testified that respondent was not asked to sign an affidavit (Butts—R. 685; Hartman—R. 980). Butts testified that he was requested to take the lie-detector test and that he refused to do so because he considered it more or less an insult (Butts—R. 789-90).

On the following day, Saturday, February 23, respondent went to the office of University President Aderhold, and resigned as Athletic Director effective February 28 (Bolton—R. 267; Butts—R. 686), stating in his resignation:

> "During the past two years, I have developed business interests. I find that I am having to devote more time to these interests. It is for this reason that I submit my resignation as athletic director of the University of Georgia effective February 28, 1963." (Butts—R. 771).

Respondent testified he resigned because Bolton advised him his resignation would be reported in the press and that would be embarrassing to Dr. Aderhold (R. 769-770) Bolton denied so advising respondent (R. 1124-1125).

As permitted by Georgia law (R. 1071-1072), six persons connected with the University of Georgia testified for petitioner with respect to respondent's credibility. Dr. Aderhold, who had been president of the University for 13 years and who was Chairman of the Athletic Board, said that the general character of respondent was bad (R. 1094-1095). J. D. Bolton, Comptroller and Treasurer of the University and Treasurer of the Georgia athletic association, said that respondent's character in the community was bad and that he would not believe respondent

under oath (R. 1153). Similar testimony was given by four members of the Athletic Board: Harold Heckman, head of accounting and professor of accounting at the University (R. 1069, 1071-1072); William Bradshaw, an alumnus and former player (R. 1076, 1087); R. H. Driftmier, head of both the department and the division of agricultural engineering (R. 1088-1089); and Dr. Hugo Mills, an associate professor in the Education School of the University (R. 1142).[2]

Three or four days before February 24, Dr. Aderhold called the President of the University of Alabama, Dr. Frank A. Rose, and arranged a meeting in Birmingham (Rose—R. 1214). On Sunday, February 24, Dr. Aderhold, accompanied by Cook Barwick, met Dr. Rose and Bernie Moore at the latter's office in Birmingham (Aderhold—R. 1125; Rose—R. 1214-15) and advised Dr. Rose of the information disclosed by their investigation (Aderhold—R. 1125-26). Dr. Rose was specifically asked to investigate to determine whether respondent had given Bryant plays and detailed information about the Georgia team and whether this information helped Alabama in the game (Rose—R. 1248-49).

Upon his return to Tuscaloosa, Dr. Rose discussed the matter with Coach Bryant for approximately three hours (Bryant—R. 581; Rose—R. 1215). Bryant was unable to remember either the September 13 or the September 16 conversation (Bryant—R. 584), but, according to Rose, told Rose that he and respondent had talked on a number of occasions about rules interpretations, ticket sales and investments (Rose—R. 1216-17).

Dr. Rose talked to Coach Bryant on two or more occasions (Rose—R. 1217), and on March 6, wrote Dr. Aderhold advising him of the results of his investigation (Def. Ex. 21, R.—1420-1422);

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2. Proferred evidence that respondent had charged personal expenses to the Athletic Association was excluded (R. 822-835).

"University of Alabama
Unversity, Alabama

Office of The
President

March 6, 1963
Confidential

Dr. O. C. Aderhold, President
The University of Georgia
Athens, Georgia

Dear Aderhold:

I have spent a great deal of time investigating thoroughly the questions that were raised during our meeting in Birmingham and have talked with Coach Bryant at least on two occasions. As best as I can ascertain, this is the information that I have received.

Coach Butts has been serving on the football rules committee, and at a meeting held last summer of the Rules Committee the defenses used by Coach Bryant, L.S.U. and Tennessee were discussed at length and new rules were drawn up that would severely penalize these three teams unless the defenses were changes, [sic] particularly on certain plays.

Coach Butts had discussed this with Coach Bryant and the two were together at some meeting where Coach Butts told Coach Bryant that the University of Georgia had plays that would severely penalize the Alabama team and not only would cause LeRoy Jordan, an Alabama player, to be expelled from the game, but could severely injure one of the offensive players on the Georgia team.

Coach Bryant asked Coach Butts to let him know what the plays were, and on September 14 he called Coach Bryant and told him. There was a question about another one of the offensive plays of the Georgia team that could seriously penalize the Alabama team and bring on additional injury to a player. Coach Bryant asked Coach Butts to check on that play, which he did, and called back on September 16.

It was then that Coach Bryant changed his defenses and invited Mr. George Gardner, Head of the Officials of the Southeastern Conference, to come to Tuscaloosa and interpret for him the legality of his defenses. This Mr. Gardner did the following week.[2] The defenses were changed and Coach Bryant was grateful to Coach Butts for calling this to his attention.

Coach Bryant informs me that calling this to his attention may have favored the University of Alabama football team, but that he doubts it seriously. He did say that it prevented him from using illegal plays after the new change of rules.

I have checked into other matters that were discussed and can find no grounds for Mr. Bisher's accusations, and as I understand it he has now decided for lack of information to drop the matter.

Dr. Aderhold, this continues to be a serious matter with me, and if you have any additional information I would appreciate your furnishing me with it as I am not only anxious to work with you but to satisfy my own mind.

Thanking you for coming to Birmingham to meet with me and for sharing this information, I am

Most cordially yours,
Frank A. Rose,
President."

2. Dr. Rose admitted at the trial that George Gardner had visited the University of Alabama before the September 13 call, at the request of Bryant, and, therefore, Bryant did not invite Gardner to the University after the call as stated in the letter (Rose—R. 1224).

Dr. Rose testified he had dictated the letter hurriedly on the morning of March 6 before catching an 8:40 A.M. plane to attend a meeting of the American Council on Education in Washington and that it was mailed without his